SUKMA DARMAWAN SASMITAAT MADJA

v.

PP & ANOTHER APPLICATION

HIGH COURT MALAYA, KUALA LUMPUR
ARIFIN JAKA J
[CRIMINAL APPLICATION NOS: 44-25-99 & 44-27-99]
12 MAY 2001

CRIMINAL PROCEDURE: *Charges - Striking out - Whether charges amount to abuse of process of court - Meaning of abuse of process of court*

CRIMINAL PROCEDURE: *Charges - Amendment of - Powers of Public Prosecutor to amend charges - Whether Public Prosecutor acted in bad faith*

CRIMINAL PROCEDURE: *Charges - Delay in prosecution of - Whether delay unjustifiable*

The applicants were charged with the offence of committing and abetting respectively carnal intercourse against the order of nature with one Azizan bin Abu Bakar – an offence punishable under s. 377B of the Penal Code. According to the charges, the offence was alleged to have been committed in May 1994 at about 7.45pm at Unit No 10-7-2 Tivoli Villa, Jalan Medang Tanduk, Wilayah Persekutuan, Kuala Lumpur. The charges against the applicants were amended several times and finally referred to the offence having been committed between January to March of 1993, at about 7.45pm.

The applicants prayed for an order that the proceedings be struck out under the inherent jurisdiction of the court on the ground that it was made in bad faith, was prejudicial and oppressive and that it was an abuse of the process of the court. The applicants also submitted that the proceedings against them were *mala fide* because the charges were amended without basis and could not be sustained and that there was a delay in the prosecution of the charges.

Held:

[1] It is an abuse of the process of the court if (a) either the prosecution has manipulated or misused the process of the court so as to deprive the accused of a protection provided by the law or to take unfair advantage of a technicality or (b) the accused has been or will be prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution. (p 733 d-e)

[1a] The burden of establishing that the pursuit of particular proceedings would amount to an abuse of the process is on the accused and the standard of proof is the balance of probabilities. (p 733 g-h)

[1b] The proceedings in question were instituted and the charges were framed against the applicants based on the evidence available as a result of the investigation by the police. There is not an iota of evidence to show that the police carried out the investigation which led to the charges being framed against the applicants in bad faith. (p 734 a-b)

[2] The evidence that can be gathered from the affidavit filed on behalf of the respondent clearly shows that there was no unjustifiable delay. The first applicant was arrested in 1999 and produced and charged in court on 23 April 1999 whilst the second applicant was arrested on 20 September 1998 and was produced and charged on 29 September 1998 almost immediately. In these circumstances the applicants could not be said to have been prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution. (p 734 f)

[3] It is trite that under art. 145(3) of the Federal Constitution, the attorney general is vested with the power, exercisable at his discretion to institute, conduct or discontinue any proceedings for an offence other than proceedings before a syariah court, a native court or a court-martial. The discretion vested in the attorney general is unfettered and cannot be challenged or substituted by that of the courts. (p 735 a-b)

[3a] The power under art. 145(3) of the Federal Constitution includes the power to decide what charge or charges are to be brought against any accused based on the evidence available before him. This power also includes the power to amend the charge or charges at anytime before judgment is pronounced. (p 735 d)

[3b] In this case, the attorney general amended the charges at a very early stage before the trial of both the applicants commenced. There is no evidence to show that the amendment was made in bad faith. (p 735 e-f)

[3c] The fact that the amendment was made after receipt of the notice of the alibi given by the applicants under s. 402A of the Criminal Procedure Code does not mean that the amendment was made *mala fide*. If as a result of an investigation carried out on receipt of the notice of alibi evidence is obtained that there is a basis for amending the charge

or charges then it would be perfectly in order for the prosecution to amend that charges. The question of *mala fide* does not arise.
(p 735 f-g)

[Applications dismissed.]

Case(s) referred to:
A-G's Reference (No 1 of 1990) [1992] 1 QB 630 ***(foll)***
Hui Chi-ming v. The Queen [1992] 1 AC 34 ***(foll)***
Karpal Singh Ram Singh & Anor v. PP [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 ***(refd)***
Long Samat & Ors v. PP [1974] 2 MLJ 152 ***(refd)***
PP v. Lee Tin Bau [1985] 1 MLJ 388 ***(refd)***
R v. Telford JJ, ex p Badhan, R v. Crown Court at Norwich, ex p Balshan [1994] Cr App R382 ***(foll)***
R v. Great Yarmouth Magistrates, ex p Thomas [1992] Cr LR 116 ***(foll)***

Legislation referred to:
Criminal Procedure Code, ss. 376(i), 402A, 418A, 425
Federal Constitution, art. 145(3)
Penal Code, ss. 109, 377B

Other source(s) referred to:
Archbold, *Criminal Pleading, Evidence and Practice*, 1998, p 291

For the 1st applicant - Karpal Singh (Jagdeep Singh Deo & Gobind Singh Deo)
For the 2nd applicant - YM Raja Aziz Addruse (Sulaiman Abdullah, Christopher Fernando, Zainur Zakaria, Pawancheek Merican, Gurbachan Singh, SN Nair, Zulkifli Nordin & Robyn Choi)
For the PP - Tan Sri Mohtar Abdullah, AG (Abdul Gani Patail, Azahar Mohamed, Mohd Yusof Zainal Abidin, Nordin Hassan & Shamsul Sulaiman)

Reported by Mariette Peters-Goh

JUDGMENT

Arifin Jaka J:
There are two applications before this court. The first in Permohonan Jenayah No: 44-25-99 the applicant, Sukma Darmawan Sasmitaat Madja (hereinafter referred to as the "1st applicant") prays for an order that the criminal proceeding against him in Criminal Trial No: 45-26-99 be struck out under the inherent jurisdiction of the court on the ground that it is an abuse of the process of the court and for any other order the court may deem fit and proper under the circumstances of the case.

The second application was made in Permohonan Jenayah No: 44-27-99 by Dato' Seri Anwar Ibrahim (hereinafter referred to as the "2nd applicant"). He prays for an order that the criminal proceedings *vide* Wilayah Persekutuan Perbicaraan Jenayah No. 45-51-98 and the charge brought against him be struck out on the ground that the said proceedings and the charge are oppressive and an abuse of the process of this court or alternatively that the amendment of the charge substituting for the words "in the month of May 1992" the words "between the months of January and March 1993" be disallowed on the ground that it is made in bad faith, is prejudicial to the applicant, is oppressive and is an abuse of the process of the court.

Background

The 1st applicant was charged before the Sessions Court, Kuala Lumpur on 23 April 1999 with two offences, firstly for abetting Dato' Seri Anwar Ibrahim in committing carnal intercourse against the order of nature on Azizan Abu Bakar, an offence punishable under s. 109 read with s. 377B of the Penal Code (FMS Cap. 45) and secondly for voluntarily committing carnal intercourse against the order of nature with Azizan Abu Bakar, an offence punishable under s. 377B of the same Code. The charges state that the offences were alleged to have been committed in the month of May 1992 at about 7.45pm at Unit No. 10-7-2, Tivoli Villa, Jalan Medang Tanduk, Wilayah Persekutuan, Kuala Lumpur. The case was transferred to the High Court on a certificate (P2) issued by the public prosecutor by virtue of his power under s. 418A of the Criminal Procedure Code (FMS Cap. 6)(the Code) and it was fixed for trial on 7 June 1999.

The 2nd applicant was first produced and charged before the Sessions Court Kuala Lumpur on 29 September 1998 with an offence of voluntarily committing carnal intercourse against the order of nature with Azizan Abu Bakar, an offence punishable under s. 377B of the Penal Code (FMS Cap. 45). The charge states that the offence was alleged to have been committed in May 1994 at about 7.45pm at Unit No. 10-7-2 Tivoli Villa, Jalan Medang Tanduk, Wilayah Persekutuan, Kuala Lumpur. The case was transferred to the High Court, Kuala Lumpur pursuant to a certificate (P1) issued by the public prosecutor in the exercise of his powers under s. 418A of the Code and was mentioned before the High Court judge on 10 October 1998. The case came up for mention again on 14 and 27 April and 4 May 1999. On 27 April 1999 the prosecution amended the charge in respect of the year 1994 to be substituted with the year 1992.

The joint trial of both the applicants in Criminal Trial No: 45-26-99 and Criminal Trial No: 45-51-98 began on 7 June 1999. At the commencement of the trial, the prosecution tendered amended charges against both the applicants. The charges against the 1st applicant were amended in that the

words "dalam bulan Mei 1992" be amended to read "di antara bulan Januari hingga Mac 1993". The amended charge against the 2nd applicant was again amended in the same manner ie, the words "di dalam bulan Mei 1992" be amended to read "di antara bulan Januari hingga Mac 1993". The charges against both the applicants as finally amended are as follows:

Against the 1st applicant:

Pertuduhan Pertama:

Bahawa, pada satu malam di antara bulan Januari hingga Mac 1993, lebih kurang jam 7.45, di Unit No. 10-7-2, Tivoli Villa, Jalan Medang Tanduk, Bangsar, dalam Wilayah Persekutuan Kuala Lumpur, Dato' Seri Anwar bin Ibrahim telah melakukan persetubuhan yang bertentangan dengan aturan tabii dengan Azizan bin Abu Bakar, di mana Dato' Seri Anwar bin Ibrahim tersebut telah memasukkan zakarnya di dalam dubur Azizan bin Abu Bakar dan kamu pada hari dan tempat yang sama, telah bersubahat melakukan kesalahan tersebut di mana kesalahan tersebut telah dilakukan hasil daripada persubahatan kamu, dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 109 dibaca bersama seksyen 377B Kanun Keseksaan (NMB 45).

English Translation:

That, on one night between the months of January to March 1993, at or about 7.45 at Unit No. 10-7-2, Tivoli Villa, Jalan Medang Tanduk, Bangsar, in the Federal Territory of Kuala Lumpur Dato' Seri Anwar bin Ibrahim did commit carnal intercourse against the order of nature with Azizan bin Abu Bakar to wit the said Dato' Seri Anwar bin Ibrahim did introduce his penis into the anus of Azizan bin Abu Bakar and that you on the same day and at the same place did abet in the commission of the said offence where the said offence was committed in consequence of your abetment and you have thereby committed an offence punishable under section 109 read together with section 377B of the Penal Code (FMS Cap 45).

As against the 2nd applicant:

Bahawa kamu, pada satu malam di antara bulan Januari hingga Mac 1993, lebih kurang jam 7.45 malam, di Unit No. 10-7-2, Tivoli Villa, Jalan Medang Tanduk, Bangsar dalam Wilayah Persekutuan Kuala Lumpur telah dengan sengaja melakukan persetubuhan bertentangan dengan aturan tabii dengan Azizan bin Abu Bakar dengan memasukkan zakar kamu ke dalam duburnya dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 377B Kanun Keseksaan (NMB Bab 45).

English Translation:

That you, on one night between the months of January to March 1993, at or about 7.45 at Unit No. 10-7-2, Tivoli Villa, Jalan Medang Tanduk, Bangsar,

in the Federal Territory of Kuala Lumpur, did voluntarily commit carnal intercourse against the order of nature with Azizan bin Abu Bakar by introducing your penis into his anus, and you have thereby committed an offence punishable under section 377B of the Penal Code (F.M.S. Cap 45).

At the commencement of the trial counsels for both the applicants made an oral application to strike out the proceedings and the charges against both the applicants. Both counsels requested for an adjournment to enable them to file a proper application by way of notice of motion to strike out the proceedings based on the case of *Karpal Singh Ram Singh & Anor v. PP* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183, hence these applications before the court. All parties agree that the applications be heard together.

The applications are supported by the affidavits filed by the applicants. The 1st applicant himself affirmed two affidavits, the first dated 8 June 1999 (encl. 3) in support of the application and the second affirmed on 10 June 1999 (encl. 6) in reply to the affidavit filed by the learned attorney-general. Another affidavit in support of the application was affirmed on 14 June 1999 by Gurbachan Singh Bagawan Singh (encl. 8), an advocate and solicitor, who is to be noted was one of the counsels for the 2nd applicant.

The 2nd applicant himself affirmed an affidavit on 9 June 1999 (encl. 3) in support of the application and another one affirmed on 10 June 1999 by Sankara Narayanan Sankaran Nair (encl. 10).

Before I proceed to deal with the grounds on which the applications are founded, it is necessary to mention two points raised by the counsels for both the applicants, the first point was concerning an application for a postponement of the hearing of the application on 11 June 1999 on the ground that the counsels required some time to file an affidavit in reply to the affidavits filed on behalf of the respondent. On behalf of the respondent four affidavits were filed in reply to the affidavits filed by and on behalf of the applicants. All the affidavits were affirmed on 9 June 1999 by SAC 1 Musa Hassan (encl. 4), Azahar Mohamed (encl. 5), Dato' Abdul Gani Patail (encl. 6) and by Tan Sri Mohtar Abdullah (encl. 7). It was pointed out by the counsels that they need time to scrutinise these affidavits and to take further instructions from their clients as there are issues raised therein which ought to be replied. Karpal Singh raised the issue that there was a tape recording pertaining to a conversation between Dato' Abdul Gani Patail and Azahar Mohamed which would reveal that these two officers made an attempt to compel Dato' Nallakaruppan to give false evidence against the 2nd applicant and this would show *mala fide* on the part of the prosecution. Karpal Singh urged the court to grant an adjournment to enable him to file an affidavit to produce the tape. I see no merit in the application for a postponement on this ground

as this tape was never mentioned in any of the affidavits filed on behalf of the respondent. The existence of the tape was within the knowledge of the applicants as can be gathered from the affidavit of Gurbachan Singh (encl. 8). Karpal Singh should have thought about this and filed an affidavit much earlier and not to wait till the eleventh hour to do so. In any event, I am of the view that the tape is not relevant as it concerned evidence which was only relevant at the previous trial of the 2nd applicant. Even assuming that the tape is relevant in this trial, it would not help the applicants in their application to strike out the proceeding herein as the question of its admissibility has to be considered and this could be done at the full trial and not at this stage.

Further on reading the affidavits in reply filed on behalf of the respondent, I find that the contents of these affidavits relate to issues raised by the applicants in their affidavits in support of the application. There are sufficient materials which could form the basis of arguments by both the applicants' counsels and the prosecution. A postponement under these circumstances would cause undue delay in the prosecution of this case. The application for a postponement is devoid of any merit and therefore disallowed.

Karpal Singh also made an application to cross-examine Tan Sri Mohtar Abdullah (the attorney-general), Dato' Abdul Gani Patail and Azahar Mohamed. There is no provision in the Criminal Procedure Code to allow such an application. Karpal Singh submitted that the question of *mala fide* is the main pillar of the applications before the court. He further urged the court to resort to s. 425 of the Code to call these officers for cross-examination. With due respect, I am of the view that s. 425 does not apply in this case as the application is based on affidavits and no witness ought to be called.

It is the court's discretion whether to allow the cross-examination of a deponent of an affidavit. In the instant case, I fail to see any useful purpose of such an exercise. The counsels for the applicants had not condescend to any particular points raised in the affidavits to assist the court in deciding whether to exercise its discretion to allow the cross-examination of the deponents. The question of *mala fide* should be adjudged on the strength of the contents of the affidavits and not by evidence through cross-examination of the deponents. I therefore disallowed the oral application made by the defence counsel.

I shall now deal with the grounds of the applications.

Abuse Of The Process Of The Court

The common ground on which the applications by both the applicants are founded is that the proceedings and the charges against the applicants are oppressive and an abuse of the process of the court.

It is an established principle that in the case of obvious abuses or other forms of material defects, it cannot be said that the High Court does not possess the powers to do the rights and to undo wrong in the course of administration (see *Karpal Singh Ram Singh & Anor v. Public Prosecutor* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183).

What is an abuse of process? In *Hui Chi-ming v. The Queen* [1992] 1 AC 34 the Privy Council pronounced at p. 57 that "their Lordships find no aspect of the case which can credibly be described as an abuse of process, that is, something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all respects a regular proceeding".

In Archbold – *(Criminal Pleading, Evidence and Practice 1998)* at p. 291 it is stated:

> It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality or (b) the defendant has been, or will be prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution: *R v. Derby Crown Court Ex Parte* [1984] Brooks, 80 Cr. App R. 164 D.C. as qualified by *Attorney General's Reference (No. l of 1990)* [1992] 1 QB 630, 95 Cr. App. R. 296, C.A.

In *Attorney General's Reference (No. 1 of 1990)* [1992] 1 QB 630 it was held that a stay for delay or any other reasons was to be imposed only in exceptional circumstances; that, even where the delay could be said to be unjustifiable, the imposition of a permanent stay was to be the exception rather than the rule; and that even more rarely could a stay properly be imposed in the absence of fault on the part of the complainant or the prosecution, and never where the delay was due merely to the complexity of the case or contributed to by the defendant's action.

The burden of establishing that the pursuit of particular proceedings would amount to an abuse of process is on the accused and the standard of proof is the balance of probabilities: *R v. Telford JJ, ex p Badhan, R v. Crown Court at Norwich, ex p Balshan* [1994] Cr App R382, DG and *R v. Great Yarmouth Magistrates, ex p Thomas* [1992] Cr LR 116, DC (See Archbold – *Criminal Pleading, Evidence and Practice*, 1998 at p. 290).

Mala fide

It was also submitted on behalf of the applicants that the proceedings instituted against them is *mala fide* because the charges have been amended without basis and cannot be sustained and there is a delay in the prosecution of the charges.

I have anxiously scrutinised the evidence as disclosed in the various affidavits filed by and on behalf of both the applicants and on behalf of the respondent and I find that there is no *mala fide* on the part of the prosecution in this proceedings and in respect of the charges. The proceedings was instituted and the charges were framed against the applicants based on the evidence available as a result of the investigation by the police. There is not an iota of evidence to show that the police carried out the investigation which led to the charges be framed against the applicants in bad faith. There was an allegation that Dato' Abdul Gani Patail and Azahar Mohamed was involved in an attempt to procure evidence by making use of Dato' Nallakaruppan to give false evidence to implicate the 2nd applicant in sexual activities. These are mere allegations and these allegations were denied by them in their affidavits. The applicants relied on the statutory declaration of Manjeet Singh but he was only expressing his opinion on the matter. If at all there was a meeting between him and these two officers, it revolved on the question of plea bargaining in respect of the charge Dato' Nallakaruppan was then facing which was perfectly within the ambit of the law. In any event the negotiation was in relation to the charge against Dato' Nallakaruppan and would be relevant for the purpose of that trial only. It is not relevant in this instant proceedings. I am convinced under the circumstances that there was no *mala fide* on the part of the prosecution in this instant trial.

The next question to be considered is whether there was a delay in instituting the proceeding which would amount to an abuse of process. The evidence that can be gathered from the affidavit filed on behalf of the respondent clearly shows there was no unjustifiable delay. The lst applicant was arrested in 1999 and produced and charged in court on 23 April 1999 whilst the 2nd applicant was arrested on 20 September 1998 and was produced and charged on 29 September 1998 almost immediately. Under these circumstances the applicants will not be prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution.

As regards the question of oppression, I find no evidence to support such a contention. The applicants only alleged there was oppression but has failed to adduce evidence there was an oppression.

Alternative Ground

The alternative ground advanced by the 2nd applicant in support of his application was that the amendment of the charge by substituting for the words "in the month of May 1992" the words "between the months of January and March 1993" be disallowed on the ground that it is made in bad faith, is prejudicial to the applicant, is offensive and is an abuse of the process of the court.

It is trite that under art. 145(3) of the Federal Constitution, the attorney-general is vested with the power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence other than proceedings before a Syariah Court, a native court or a court-marshal. The discretion vested in the attorney-general is unfettered and cannot be challenged or substituted by that of the courts as stated in *Karpal Singh Ram Singh & Anor v. Public Prosecutor* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 by his Lordship Tun Abdul Hamid Omar (LP) (see also *Public Prosecutor v. Lee Tin Bau* [1985] 1 MLJ 388, *Long Samat & Ors v. Public Prosecutor* [1974] 2 MLJ 152). The attorney-general is also the public prosecutor as stated under s. 376(i) of the Criminal Procedure Code (FMS Cap. 6) (the Code) which reads:

> The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under the Code.

It is clear therefore under art. 145(3) of the Federal Constitution and under s. 376(i) of the Code, the public prosecutor has the power to be exercised at his discretion to decide what charge or charges to be brought against any accused based on the evidence available before him. This power obviously includes the power to amend the charge or charges at any time before judgment is pronounced.

In the instant case, the attorney-general amended the charges at a very early stage before the trial of both the applicants commences. It was contended on behalf of the applicants that the amendment should not be allowed as it is made in bad faith, is prejudicial, oppressive and is an abuse of the process of the court. There is no evidence to show that the amendment was made in bad faith. The fact that the amendment of the charges was made after receipt of the notice of alibi given by the applicants under s. 402A of the Code does not mean that the amendment was made *mala fide*. If as a result of an investigation carried out on receipt of the notice of alibi evidence is obtained that there is a basis for amending the charge or charges then it would be perfectly in order for the prosecution to amend the charges. The question of *mala fide* does not arise. In the instant case, the attorney-general amended the charges against both applicants on the evidence available after such investigation. Under these circumstances there cannot be oppression, prejudice and *mala fide* on the part of the attorney-general which would amount to an abuse of the process of the court. The applicants have failed to show that the attorney-general has exercised his discretion wrongfully when he amended the charges against both the applicants. I find that the applicants have not produced evidence to satisfy me that there is a basis for making an order to disallow the amendment of the charges and to strike out the proceeding.

For the above reasons the applications were dismissed. I ordered that the trial of both the applicants on the amended charges be proceeded with forthwith.